

**Lomax v Gholson**

2023 NY Slip Op 32028(U)

June 6, 2023

Supreme Court, Kings County

Docket Number: Index No. 523433/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6<sup>th</sup> day of June 2023.

P R E S E N T: HON. CARL J. LANDICINO, JSC

-----X  
JAMES LOMAX AND GARY GARNETT INDIVIDUALLY AND ON BEHALF OF THE JOINT VENTURE OF JAMES LOMAX, GARY GARNETT AND SHERRYLYNN GHOLSON Index No.: 523433/2020

*Plaintiffs,*

- against -

DECISION AND ORDER

SHERRYLYNN GHOLSON, 444 MACON HOLDINGS LLC, VAGAN SADOIAN AND "JOHN DOE" AND "JANE DOE", SAID NAMES BEING FICTITIOUS AND UNKNOWN TO PLAINTIFFS, INTENDED ON BEING THOSE PERSONS OR ENTITIES WHO ARE MEMBERS AND/OR MANAGERS OF 444 MACON HOLDINGS LL

Motions Sequence #6, 8, 9

*Defendants.*

-----X  
Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed .....	125-131, 154-159, 164-166,
Opposing Affidavits (Affirmations).....	134-142, 168-173, 175,
Reply Affidavits (Affirmations) .....	143, 174,

After a review of the papers and oral argument, the Court finds as follows:

The Plaintiffs, James Lomax (“Lomax”) and Gary Garnett (“Garnett”), individually and on behalf of the purported joint venture of James Lomax, Gary Garnett and Sherrylynn Gholson (hereinafter referred to individually or collectively as the “Plaintiffs”) have commenced this action and raise causes of action for specific performance, constructive trust, a declaratory judgment that the subject deed transfer is void, and an action for aiding and abetting a breach of fiduciary duty in relation to the property located at 44 Macon Street, Brooklyn, New York (hereinafter the “Property or Premises”). The Plaintiffs allege in their Amended Complaint that they entered into an agreement with Defendant Sherrylynn Gholson (hereinafter “Defendant Gholson”) providing that Plaintiffs would assist Gholson in paying Property taxes for the property, assist her with obtaining title to the Property, and invest money to renovate the Property. The Plaintiffs further

allege that in exchange for their performance Defendant Gholson agreed that the Property would be sold and the proceeds would go to the parties as follows: \$250,000.00 to Gholson and the balance to Lomax and Garnett as further detailed in the agreement.

The Plaintiffs now move (motion sequence #6) for an order pursuant to CPLR 3211(a)(6) and (7), dismissing the Counterclaims asserted by Defendant Sherrylynn Gholson in the Amended Answer dated January 3, 2022. The Plaintiffs also move (motion sequence #8) for an order pursuant to CPLR 4101 and 4211, striking Defendants' jury demand.

The Defendants oppose the Plaintiffs' motions and cross move for separate relief. In opposition to the motion to dismiss the Defendants' counterclaims, the Defendants argue that the counterclaims for fraud, conspiracy, conversion, rescission, reformation, unjust enrichment and breach of contract are sufficiently plead. The Defendants further oppose the Plaintiffs' application to strike their jury demand as unfair and inequitable. The Defendants also move (motion sequence #9) for an order pursuant to CPLR 3025 granting the Defendants leave to serve a second amended answer to Plaintiffs' complaint.

The Plaintiffs move (motion sequence #6) for dismissal of the Defendants' counterclaims for fraud, conspiracy and collusion, conversion, rescission, reformation, unjust enrichment and breach of contract. However, the Defendants have cross-moved (motion sequence #9) for leave to amend their amended answer and have annexed a proposed second amended answer that, *inter alia*, has removed the counterclaims for rescission, reformation, and unjust enrichment.

The Court grants the Defendants' motion (motion sequence #9) for an order pursuant to CPLR 3025 for leave to amend the amended answer. In general, "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit." *Degregorio v. Am. Mfrs. Mut. Ins. Co.*, 90 AD3d 694, 695-96, 934 N.Y.S.2d 457, 460 [2d

Dept 2011], quoting *Sinistaj v. Maier*, 82 AD3d 868, 869, 918 N.Y.S.2d 196, 198 [2d Dept 2011]. “Additionally, “[t]he legal sufficiency or merits of a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt.” *Lucido v. Mancuso*, 49 AD3d 220, 227, 851 N.Y.S.2d 238, 243 [2d Dept 2008], quoting *Sample v. Levada*, 8 AD3d 465, 779 N.Y.S.2d 96 [2d Dept 2004]. In the instant proceeding, the counterclaims are supported by Defendant Gholson’s affidavits detailing sufficiently her allegations to support the motion. “Furthermore, where a motion to dismiss a complaint pursuant to CPLR 3211 has not been converted to a motion for summary judgment, affidavits submitted by the plaintiff may be used to remedy an inartfully pleaded complaint, but affidavits from the defendant seldom may be used to defeat a claim.” *Johnson v. Spence*, 286 AD2d 481, 483, 730 N.Y.S.2d 334 [2d Dept 2001]; *see also Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635, 357 N.E.2d 970, 972 [1976]. Accordingly, the motion (motion sequence #9) by the Defendants for leave to amend the amended answer is granted. As such, the Plaintiffs’ motion to dismiss the Defendants’ counterclaims is denied as academic, without prejudice and leave to renew.

The Court grants Plaintiffs’ motion (motion sequence #8) for an order pursuant to CPLR 4101 and 4211, striking Defendants’ jury demand. The Plaintiffs argue that since they seek equitable relief, the defendants are not entitled to a jury trial. When an action is “primarily equitable in nature, and the damages demanded by the plaintiff are merely incidental to his claim for equitable relief, the plaintiff has no right to a jury trial.” *Williams v. Eason*, 78 AD3d 935, 910 N.Y.S.2d 661 [2d Dept 2010]; *Ingenuit, Ltd. v. Harriff*, 56 AD3d 428, 428, 867 N.Y.S.2d 151, 152 [2d Dept 2008]. The Plaintiffs’ Amended Complaint raises causes of action for specific performance, action on behalf of a joint venture for specific performance, constructive trust, declaration that the deed transfer is void and a cause of action for aiding and abetting breach of

fiduciary duty. All the allegations are related to the same occurrences and actions. Accordingly, the Plaintiffs' motion to strike the Defendants' demand for a jury trial is granted.

Based upon the foregoing, it is hereby ORDERED as follows:

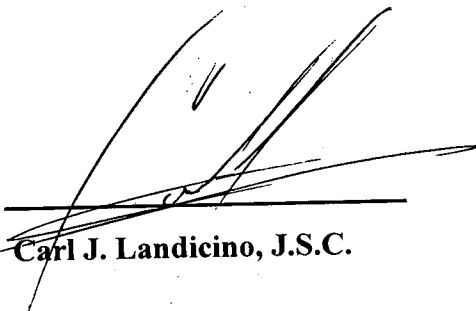
The Defendants' motion (motion sequence #9) for an order pursuant to CPLR 3025 for leave of this Court to amend the answer is granted. Defendants shall have 30 days from entry of this Decision and Order to serve and file the Second Amended Answer as provided in the moving papers.

The Plaintiffs' motion (motion sequence #6) for an order pursuant to CPLR 3211(a)(6) and (7), dismissing the Defendants' Counterclaims is denied as academic, without prejudice and leave to renew.

The Plaintiffs' motion (motion sequence #8) for an order pursuant to CPLR 4101 and 4211, striking Defendants' jury demand is granted.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

  
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Carl J. Landicino, J.S.C.